No. 83 196

In the Supreme Court of the United States

October Term, 1983

William D. Ruckelshaus, Administrator, United States Environmental Protection Agency, Appellant

v.

Monsanto Company

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

# BRIEF AMICUS CURIAE OF SATHON, INC.

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## I.

## INTEREST OF

## AMICUS CURIAE*

## SATHON, INC.

Sathon sells a pesticide which is registered with the United States Environmental Protection Agency ("EPA") under Section 3 of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. Section 136a. Sathon is a subsequent data user pursuant to FIFRA Section 3(c)(1)(D)(ii), 7 U.S.C. Section 136a (c)(1)(D)(ii) ("Section 3(c)(1)(D)(ii)"). Sathon is being compelled, against its will and contrary to the constitutional guarantees of Article III and the Fifth and Seventh

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*Amicus curiae Sathon, Inc. ("Sathon") has secured the consent of both parties herein to the filing of this brief. Counsel for Sathon have transmitted to the Clerk letters of consent from both parties herein.

Amendments, to participate in an arbitration under Section 3(c)(1)(D)(ii).

Sathon contends, as does Monsanto, that the district court correctly held unconstitutional the compulsory arbitration procedures of Section 3(c)(1)(D)(ii) for determining the compensation to be paid by a subsequent data user to an original data submitter.

## II.

## ARGUMENT

### 1. CONSTITUTIONALITY OF COMPULSORY ARBITRATION IS RIPE FOR REVIEW

The question of the constitutionality of compulsory arbitration of pesticide data compensation disputes now before the court is of great importance to the pesticide industry, the EPA and the public. It is ripe for review, no matter how the court rules on the other issues in this case.

The data disclosure issue (whether the data disclosure provisions of FIFRA Sections 3(c)(2) (A) and 10, 7 U.S.C. Sections 136a(c) (2)(A) and 136h, violate the Fifth Amendment) is clearly irrelevant to the constitutionality of compulsory arbitration. Likewise, no matter how the court rules on the data use issue (whether the data use provisions of Section 3(c)(1)(D)(ii) violate the Fifth Amendment), constitutionality of compulsory arbitration is still ripe.

The EPA's contention that the constitutionality of compulsory arbitration is not ripe for review (EPA Br. 45-46) is based on incorrect premises. There have clearly already been applications by subsequent data users, and the trial court expressly found that Monsanto had already received offers to pay from subsequent data users (J.S. App. 21a). Just as clearly, the ninety day period before an arbitration can commence has long

since expired. Compulsory arbitration is fully ripe. An actual arbitration award is not a prerequisite to ripeness of the compulsory arbitation issue. Assuming the data use provisions do not violate the Fifth Amendment and the data compensation provisions are valid*, then the statutorily established

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*It is assumed, arguendo, that the data use provisions of Section 3(c)(1)(D)(ii) (which allow the Administrator to consider data already in the EPA's files, which was submitted by an original data submitter, in support of the application of a subsequent data user) do not violate the Fifth Amendment whether the statute provides for no compensation whatsoever (as was the case with the pre-October 21, 1972 Aceto Chemical Company registrations, J.S. App. 27a) or the statute requires offers to pay like the ones received by Monsanto (J.S. App. 21a). It is further assumed, arguendo, that it is valid to condition the Administrator's consideration of certain data in the EPA's files on the subsequent data users' making an offer to compensate the original data submitter.

method** for Monsanto to obtain any compensation would be to initiate binding arbitration, a procedure which Monsanto strenuously urges is unconstitutional. Indeed, at any moment, Monsanto can be involuntarily and unconstitutionally compelled to arbitrate by any of the applicants who have already made an offer to pay. Such an arbitration deprives the arbitrants of important procedural safeguards, including their rights to the benefits of an Article III court, definite standards for compensation, the right to a jury trial and other forms of due process. Contrary to the EPA's assumption (EPA Br. 45-46), the amount

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** Monsanto may have other ways to obtain compensation, including but not limited to actions based on unjust enrichment and quasi-contract which it can assert in any court of competent jurisdiction. Moreover, Monsanto may have a Tucker Act remedy for any taking from the use of its data.

of compensation is not the only thing that matters to parties to a pesticide data compensation dispute. They also have a vital interest in having compensation determined by a procedure which in addition to being fundamentally fair, efficient and economical, comports with the Constitution. Assuming the data use and data compensation provisions are valid, there need not be a specific arbitration award before the issue of constitutionality of compulsory arbitration is ripe. An award will not make the issue any more ripe since the statute effectively precludes judicial review, and by the time the award is made the harm will already have been inflicted both on Monsanto and on any other party to the dispute. Even if the data compensation provisions are deemed a windfall for the data submitter, a sort of welfare program bestowed by Congress on large wealthy chemical companies, such a program is still subject to

Constitutional limitations. See Goldberg v. Kelly, 397 U.S. 254 (1970). This case satisfies the twofold test for ripeness of Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967), which is that the issue be purely a legal one of the sort that is traditionally appropriate for judicial decision, and failure to decide this issue would impose severe hardship on the parties.

On the other hand, if the data use provisions violate the Fifth Amendment, the issue of compulsory arbitration is still ripe. The district court held that Section 3(c)(1)(D)(ii) accomplishes an immediate de facto exercise of eminent domain for which a Tucker Act remedy is not available (J.S. App. 33a-34a, 35a-36a). As a result, the district court had to consider whether the compensation provisions of Section 3(c)(1)(D)(ii) are constitutionally adequate to compensate Monsanto for the taking resulting from the

EPA's use of data submitted by Monsanto. But even if a Tucker Act remedy is available, the data submitter would first have to go through arbitration, and the situation would be the same as that discussed under the assumption that the data use and compensation provisions are valid. The constitutionality of compulsory arbitration would be ripe now because of the lack of judicial review later and because the compulsory arbitration would, in the meanwhile, inflict the very harm Monsanto seeks to avoid.

This situation is entirely unlike the situation in Babbitt v. United Farm Worker Nat'l Union, 442 U.S. 289 (1979), upon which the EPA so strongly relies. In that case waiting until the arbitration had been completed could make the issues more ripe because the arbitration in Babbitt would be reviewable. In contrast to Babbitt, here the issues will not be made more ripe by waiting for an

arbitration award because the award is essentially nonreviewable. Moreover, in Babbitt the challenged compulsory arbitration provisions could not have any effect until there had been a strike or boycott which was restrained by a ten-day restraining order, none of which, had occurred. Monsanto has already received offers to compensate; thus, in contrast to Babbitt,all the prerequisites for compulsory arbitration have been fulfilled. Here the constitutionality of compulsory arbitration is ripe for review.

## 2. THE COMPULSORY ARBITRATION IS UNCONSTITUTIONAL BECAUSE IT VIOLATES DUE PROCESS GUARANTEES OF THE FIFTH AND FOURTEENTH AMENDMENTS

The Supreme Court has held compulsory arbitration unconstitutional as a means of settling labor disputes in packing plants, Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522 (1923), authored by

Justice Taft, and in coal mines, Dorchy v. Kansas, 264 U.S. 286 (1924), authored by Justice Brandeis. These cases held that in the absence of a compelling national emergency, as in Wilson v. New, 243 U.S. 332 (1917), or the exercise of the war powers as in Block v. Hirsh, 256 U.S. 135 (1921), the imposition of compulsory arbitration to resolve private disputes violated the due process guarantees of the Fifth and Fourteenth Amendments.

### 3. THE COMPULSORY ARBITRATION IS UNCONSTITUTIONAL BECAUSE IT VESTS JUDICIAL POWER IN TRIBUNALS NOT CREATED UNDER ARTICLE III OF THE CONSTITUTION

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) is the controlling case for any discussion of Article III. The EPA understandably relegates it to a footnote (EPA Br. 49, n. 35) because it shows that, on any analysis, FIFRA Section 3(c)(1)(D)(ii) violates Article III.

Northern Pipeline rejected the proposition that the bankruptcy courts could have been constituted, consistent with Article III, as legislative courts, because legislative courts are limited to three narrow situations--territorial courts, courts martial and courts adjudicating public rights--and bankruptcy courts satisfy none of these. Northern Pipeline, 458 U.S. at 63-76. Similarly, an arbitration obviously doesn't qualify as a territorial court or a court martial, nor does an arbitration adjudicate public rights, since these "must at a minimum arise 'between the government and others'", Northern Pipeline, 458 U.S. at 69, quoting Ex Parte Bakelite Corp., 279 U.S. 438 (1929), whereas the liability of one individual to another is a matter of private rights. Private rights disputes, such as those present both in Northern Pipeline and in the instant case, lie at the core of the historically

recognized judicial power, Northern Pipeline, 458 U.S. at 69-70, citing Crowell v. Benson, 285 U.S. 22, at 51 (1932).

Northern Pipeline also rejected the proposition that, given the existence of a right to appeal to an Article III court, the bankruptcy courts are permissible as fact-finding adjuncts to Article III courts. The bankruptcy courts were not in any sense "adjunct" to Article III courts because the Bankruptcy Act did not reserve the essential attributes of the judicial power to Article III tribunals, Northern Pipeline, 458 U.S. at 77-78.

On the one hand, Crowell v. Benson upheld a specialized agency as a fact-finding adjunct to the Article III courts where the statute prescribed a mandatory schedule of compensation, the agency was limited to determining questions of fact as to the circumstances,

nature, extent and consequences of an employee's injury, and every compensation order was appealable to an Article III court which had the power to enforce it or set it aside depending on whether it was in accordance with law and supported by the evidence. Northern Pipeline, 458 U.S. at 78. On the other hand, United States v. Raddatz, 447 U.S. 667 (1980), upheld the 1978 Federal Magistrates Act which permitted an Article III court to refer certain pretrial motions and fact-finding functions to a magistrate whose proposed findings and recommendations were subject to review in the Article III court. Northern Pipeline, 458 U.S. at 79. These cases establish that, consistent with Article III, Congress may set up fact-finding adjuncts to Article III Courts either (a) where the agency has a very narrow and specialized fact-finding function within its area of expertise, does not recommend conclusions of law, promulgates

an award which is not self-enforcing and is subject to review by an Article III court to determine if an award is in accordance with the law and the findings are supported by the evidence, or (b) where the agency has a broad and generalized fact-finding function, recommends conclusions of law, promulgates a proposed order which is not self-enforcing and is subject to review by an Article III court.

Northern Pipeline held that the Bankruptcy Act violated Article III because it allowed the bankruptcy courts to exercise plenary jurisdiction over claims by or against the debtor and to promulgate self-enforcing orders subject to review only under the deferential "clearly erroneous" standard. The bankruptcy courts could not qualify as fact-finding adjuncts because the scope of review was too narrow given the breadth of their judicial power. A fortiori, compulsory arbitration under FIFRA Section 3(c)(1)(D)(ii)

violates Article III because it grants all of the attributes of judicial power to arbitrators, reserving virtually nothing to the Article III courts. There is essentially no judicial review because Section 3(c)(1)(D)(ii) says:

> [T]he findings and determination of the arbitrator shall be final and conclusive, and no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator where there is a verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, or other misconduct. (Emphasis supplied)

This extremely narrow scope of review is even more restrictive than the scope of review found to be insufficient in Northern Pipeline. Yet within their office, the arbitrators' powers here are at least as broad as those of the bankruptcy judges in Northern Pipeline.

According to the statute, the arbitrators are to be chosen from the roster of the Federal Mediation and Conciliation Service ("FMCS"). They would have to decide all questions of law involved in the dispute, including the proper measure of compensation, the applicable statute of limitations, the applicablity of doctrines of waiver, laches, estoppel, work product and attorney-client privilege, the proper venue for the proceeding, the proper scope of discovery and admissibility of evidence. And the legal issues they decide are completely exempt from judicial review. They would also have to decide all issues of fact involved in the dispute, including precisely what studies should be compensible (including the contents, protocols and results of the studies), the cost of the data, the data user's reasonable share of the cost of the data (taking into account the

exclusive use period under Section 3(c)(1)(D)(ii), the data submitter's other uses for the data and others who have or will share in the cost of the data), the method of payment (possibly including a reasonable royalty, see H.R. Rep. 94-479 (Agriculture) p. 65), the qualifications of experts, the credibility of witnesses and the appropriate provisions of protective orders. And the factual issues they decide are also completely exempt from judicial review. On the very matter in issue, that of compensation, the arbitrators could choose not to take into account the factors just mentioned, and nevertheless their decision is simply not reviewable.

The arbitrator's decision is self-enforcing because Section 3(c)(1)(D)(ii) provides that, "without further hearing," the subsequent data user's application shall be denied, or its registration shall be cancelled, if the Administrator determines that the subsequent data

user has failed to comply with the terms of an arbitration decision.

In short, Section 3(c)(D)(1)(ii) confers on the arbitrators, with virtually no judicial review, the plenary duties of a judge with no guidelines or constraints, presiding over a lawsuit from first to last. There is no meaningful sense in which the arbitrators are "adjuncts" to an Article III court.

Compulsory arbitration under FIFRA Section 3(c)(1)(D)(ii) is also unconstitutional under the analysis used by the Northern Pipeline dissenters. The dissenters also concluded that this Court retains the final word on how, consistent with Article III, Congress may balance competing constitutional values and legislative responsibilities, Northern Pipeline, 458 U.S. at 113. In striking that balance, the most critical factor to the dissenters is the presence (and, presumably, the scope) of review by an Article

III Court, Northern Pipeline, 458 U.S. at 115. Even on the dissenters' view, compulsory arbitration under Section 3(c)(1)(D)(ii) is unconstitutional because, as just discussed, review by the Article III Courts is virtually non-existent. The lack of judicial review is especially pernicious given the complete absence of standards for determining compensation, to which we now turn.

## 4. THE FIFRA ARBITRATION PROVISIONS ARE UNCONSTITUTIONALLY VAGUE

FIFRA Section 3(c)(1)(D)(ii) contains absolutely no standards for determining compensation and, because the judicial review is virtually non-existent, there is no possibility that standards can ever be developed.

The EPA (EPA Br. 48) and PPG Industries as Amicus Curiae (PPG Br. 6-11) are correct in stating that Congress intended compensation to be based on "a sharing of the governmentally

required cost of producing the test data." Chevron Chemical Co. v. Costle, 641 F. 2d 104, 109 (3rd Cir. 1981), cert. denied 452 U.S. 961 (1981) (emphasis supplied).

The legislative history of FIFRA establishes that compensation was intended to be based on a sharing of costs. This has been the consistent standard ever since 1972, as is clearly set forth in the legislative history of the 1972, 1975 and 1978 amendments. The 1978 amendments are at issue in the case at bar. See S. Rep. No. 95-334 (Agriculture, Nutrition and Forestry), p. 4, "This bill will solve the problems by clearly defining the limits of trade secrets while . . . recognizing . . . the need for cost sharing among registrants." (emphasis supplied), p. 8, "The Subcommittee . . . accepted the provisions in S. 1678 . . . for binding arbitration where the parties cannot agree as to the equitable sharing of the costs," (emphasis

supplied); p. 31, "It [S. 1678] . . . keys the amount of payment by subsequent registrants to the cost of developing data necessary for governmental approval," (emphasis supplied); p. 95, "The sharing of the costs shall be on an equitable basis," (emphasis supplied); and p. 109, "we favor mandatory licensing of data with opportunity for sharing of data costs through compensation provisions," (emphasis supplied). See also, and 123 Congressional Record - Senate (1977) p. 25706," [The statutory scheme] protects the data developer's right to recover his data generation costs," (emphasis supplied). Under the 1972 and 1975 amendments, both of which also provided for mandatory licensing with compensation but without compulsory arbitration, the standard of compensation was also the equitable sharing of costs. Concerning the 1972 amendments, see S. Rep. No. 92-838 (Agriculture and Forestry), reprinted in 1972 U. S. Code Cong. & Ad. News,

p. 3993, at p. 4025, "The Agriculture Committee provision would not preclude other researchers from making their own similar tests or sharing by agreement in the costs and results of research done by others," (emphasis supplied); p. 4034 "[T]his provision is likely to result in equitable sharing of research costs. There would be little reason for duplicate testing if a second registrant could share in the test data of the first by paying a part of the cost. And there would be little reason for the first registrant nor recouping a part of his cost in this manner, since if he does not the second registrant can do his own testing," (emphasis supplied); p. 4089, "The substitute retains the exclusive use of data provision recommended by this Committee; but provides in addition for a mandatory licensing system under which permission to use test data in return for a reasonable share of the cost of producing the data would be required,"

(emphasis supplied); and p. 4092, "Thus it was decided that fairness and equity require a sharing of the governmentally required cost of producing the test data used in support of an application by an applicant other than the originator of such data," (emphasis supplied). 118 Congressional Record - Senate (September 26, 1972) p. 32257 (same as 1972 U.S. Code Cong. & Ad. News p. 4089, above) and p. 32258 (same as 1972 U.S. Code Cong. & Ad News, p. 4092, above) and Conf. Rep. No. 92-1540 reprinted in 1972 U. S. Code Cong. & Ad. News, p. 4130, at p. 4132, "The conferees concluded that the Administrator is in the best position to determine the proper amount of reasonable compensation for producing the test data that should be accorded the originator of such data," (emphasis supplied). Concerning the 1975 amendments, S. Rep. No. 94-452 (Agriculture and Forestry) p. 10, "As developed more fully in the Committee reports accompanying

the 1972 amendments, this provision was added to provide for equitable sharing among industry members of the cost of producing data necessary to obtain or continue a registration under the Act," (emphasis supplied).

The administrative interpretation of FIFRA when, prior to the 1978 amendments, compensation was determined by the EPA, also establishes that compensation was intended to be based on a sharing of cost. Ciba-Geigy Corp. v. Farmland Industries, Inc., FIFRA Comp. Dkt. Nos. 33, 34 and 41, slip opinion at p. 46 (Aug. 19, 1980), final order issued by the judicial officer (April 30, 1981), affirmed by the Administrator (July 28, 1981); Union Carbide Agricultural Products Co. v. Thompson-Hayward Chemical Co., FIFRA Comp. Dkt. No. 27, slip opinion at p. 21 (July 13, 1982): "But it would appear that it was only the incremental cost of obtaining a registration that Congress appears to have been concerned about,

and the desirability of neutralizing any adverse effect on research and development which would be caused if the entire testing cost were imposed on the first registrant," emphasis supplied.

The judicial interpretation of FIFRA also establishes that compensation was intended to be based on a sharing of costs. Chevron Chemical Co. v. Costle, 641 F.2d 104, 109 (3rd Cir. 1981), cert. denied 452 U.S. 961 (1981); Amchem Products, Inc. v. GAF Corp. 594 F.2d 470, 481 (5th Cir. 1979), modified, 602 F.2d 724 (5th Cir. 1979): "It was never the intent of Section 3(c)(1)(D)(ii) to provide more than an equitable sharing of research costs,") (emphasis supplied); Chevron Chemical Co. v. Costle, 443 F. Supp. 1024, 1028 n.2. (N. D. Cal. 1978) [purpose of data compensation was] "saving the cost of duplicative test data,") (emphasis supplied); Mobay Chemical Corp v. Costle, 12 Env't Rep. Cas. (BNA) 1572, 1578

(W.D. Mo. 1978), appeal dismissed for want of jurisdiction, 439 U.S. 320 (1979) (per curiam): "[T]he Congressional concern in adopting the original 3(c)(1)(D) was for maximum allocation of resources in the public interest by preventing the necessity of costly duplicative testing in order to produce governmentally-mandated data without thereby casting the entire burden upon the party first to meet the government requirements by producing or submitting that data," (emphasis supplied).

Mobay also establishes that the courts, consistent with the congressional intent, have expressly rejected the value theory. "The protection afforded by Section 3(c)(1)(D) extends only to compensation for producing test data used in the registration process, and not to the ultimate economic or commercial benefits which may flow from the registration itself," (emphasis supplied.) Mobay Chemical

Corp. v. Costle, 447 F. Supp. 811, 834 (W.D. Mo. 1978) modified, 517 F. Supp. 252 (W.D. Pa. 1981), aff'd. sub nom. Mobay Chemical Corp. v. Gorsuch, 682 F.2d 419 (3rd Cir. 1982) cert. denied, 103 S.Ct. 343 (1982).

Despite the seemingly clear legislative history and administrative and judicial interpretation, due to the fact that actual language adopted by Congress contains no standards, such language has already led to an award that bears no rational relation to cost. In the only arbitration under Section 3(c)(1)(D)(ii) ever completed, the claimant was awarded a sum equal to more than twenty times the data user's fair share of cost of producing the data. The arbitration respondent in the Stauffer/PPG arbitration claimed the compensation should be based on cost sharing. The arbitration claimant, relying on the absence of standards in the statute, claimed compensation on a "value" theory based on the

alleged "economic benefit" to PPG of "being able to start marketing its butylate some five years earlier than it could have without reliance on Stauffer's data," page 12 of the Award, a copy of which is attached to the Complaint in PPG Industries, Inc. v. Stauffer Chemical Company, Case No. 83-1941, United States District Court for the District of Columbia. The Award charged PPG with $1.46 million as its one-half share of Stauffer's historical costs, which were $2.93 million expressed in 1983 dollars. However, the Award in Stauffer adopted the "value" theory, which resulted in an award against PPG which one of the attorneys for Stauffer, has said has a present value of over $30 million. This statement was made during the October 11, 1983 hearing in Sathon, Inc. v. American Arbitration Association and Zoecon Corporation, Case No. 83 C 6019, United States District Court for the Northern District of

Illinois.) Thus, the value theory produces a windfall for the data submitter and erects a barrier to competitors' entry into the market-place, both of which are contrary to Congress' intent in enacting FIFRA Section 3(c)(1)(D)(ii).

The foregoing example is precisely the sort of standardless, unrestrained and unreviewable discretion that renders the statute unconstitutionally vague.

## 5. THE COMPULSORY ARBITRATION IS UNCONSTITUTIONAL BECAUSE OF ABSENCE OF THE RIGHT TO A JURY TRIAL

The Seventh Amendment preserves the right to a jury trial in suits at common law. The compulsory arbitration provisions of FIFRA are also unconstitutional because they deny the parties their Seventh Amendment right to a jury trial. The data submitter's claim for compensation, if any, is a monetary claim

in the nature of an action of general assumpsit at common law, Thomas v. Matthiesson, 232 U.S. 221, 235 (1914); Archawski v. Hanioti, 350 U.S. 532, 534 (1956); 7 C.J.S., "Assumpsit, Action of", §§ 3 and 10.b; for which the right to a jury trial is preserved, Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Moore, Lucas and Wicker, 5 Moore's Federal Practice (1982 Ed.), par. 38.11[5]. The parties to a FIFRA data compensation dispute have the right to have a jury decide (1) the data for which compensation is to be paid, (2) the total cost of such data, (3) the data user's reasonable share of the cost of the data.

## 6. THE COMPULSORY ARBITRATION IS UNCONSTITUTIONAL BECAUSE OF THE ABSENCE OF SAFEGUARDS FOR PROCEDURAL DUE PROCESS

When governmental agencies adjudicate or make binding determinations which directly

affect legal rights, it is imperative that those agencies use the procedures that have traditionally been associated with the differing types of proceedings. Whether the Constitution requires a specific right in a specific proceeding depends on the private interest implicated, the nature of the right involved (including the risk of an erroneous determination that can be avoided by the added procedural safeguard), the nature of the proceeding and the possible burdens on that proceeding including costs that the additional procedures would involve. Hannah v. Larche, 363 U.S. 420, 422 (1960); Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Complusory arbitration under FIFRA Section 3(c)(1)(D)(ii) purports to decide the original data submitter's claim for compensation from the subsequent data user for the use by the Administrator of data submitted by the former in support of the

atter's application. This proceeding is clearly an adjudication, since it decides the liability of one party to another party, Northern Pipeline, 458 U.S. at 70. Compulsory arbitration denies the parties' Fifth Amendment right to due process of law because (a) compulsory arbitration is offensive to the Fifth Amendment, as seen above, absent some form of national emergency or the exercise of the war powers, (b) the parties have the right to an adjudication by an Article III court, (c) the parties have the right to compulsory process for obtaining evidence in their favor, and (d) the party against which the claim is made has the right to have the adjudication held in an area with which it has at least a minimum level of contacts. These procedural safeguards are rules of fair play which have become associated with proceedings which adjudicate monetary claims between private parties, and none of these safeguards impose

an undue burden on the proceeding. In considering the possible burden the procedural safeguards impose on the proceeding, it is appropriate to also consider the burden the proceeding imposes on the parties. The burden of the proceeding can itself be devastating, and with substantial anticompetitive effects.*

The Article III issue previously discussed is not merely a question of separation of powers. It also affects the right to have an

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*Sathon is literally engaged in a struggle for its very survival against a competitor, Zoecon Corporation, whose sales are over 160 times Sathon's and the sales of whose parent are approximately 10,000 times Sathon's, and against a claim for 12 to 20 times Sathon's annual sales, Affidavit of W. Eric Ashton attached as Exhibit A to Memorandum in Support of Alternative Motion for Preliminary Injunction filed in Sathon, Inc. v. American Arbitration Association and Zoecon Corporation, U.S. District Court for the Northern District of Illinois, Case No. 83 C 6019.

adjudication in a constitutionally guaranteed forum.

The failure of compulsory arbitration under Section 3(c)(1)(D)(ii) to give the parties the right to compulsory process for obtaining evidence in their favor denies due process because this procedural right is universally allowed in proceedings to adjudicate monetary claims. Most importantly, compulsory process must be available to require the EPA to identify the data actually required and/or relied upon in support of the application.

The FIFRA arbitration procedures are also unconstitutional in that there is no standard for determining the locale of the arbitration. The Due Process clause of the Fifth Amendment requires the same interpretation as the Due Process Clause of the Fourteenth Amendment, namely to require that the contacts of the nonconsenting party with the forum "must be

such that maintenance of the suit 'does not offend traditional notions of fair play and substantial justice.'" World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292, (1980). Yet the nonconsenting arbitrant can be forced into a locale with which it has absolutely no contacts, ties or relations. This denies due process. Woodson, 444 U.S. at 294.

7. THE FEDERAL MEDIATION AND CONCILIATION SERVICE WAS WITHOUT AUTHORITY TO DELEGATE FIFRA ARBITRATIONS TO THE AMERICAN ARBITRATION ASSOCIATION

With respect to compulsory arbitrations, FIFRA Section 3(c)(1)(D)(ii) provides:

> (1) That the request for arbitration shall be made of the Federal Mediation and Conciliation Service;
>
> (2) That the arbitrators shall be selected from the roster maintained by such Service; and
>
> (3) That the procedure and rules of such Service shall be applicable,

(i) to the selection of the arbitrator, and

(ii) to such arbitration proceedings.

The Federal Mediation and Conciliation Service (FMCS) is an independent governmental agency. 29 U.S.C. 172(a). The appointment of a roster of conciliators and mediators is a regulatory function specifically included in the statute creating FMCS. 29 U.S.C. 172(b); 29 C.F.R. 1404.4-.6 (1983).

The procedure for the selection of arbitrators and the arbitration proceedings are likewise within the regulatory function of the agency. 29 C.F.R. 1404.10-17 (1983). The power to delegate is also specifically set forth in the statute. "The Director may by order, subject to revocation at any time, delegate any authority and discretion conferred upon him by this chapter to any regional director, or other officer or employee of the Service". 29 U.S.C. 172(c). No authority

exists in the statute for the FMCS to delegate any of its functions to any other person or organization. Under the general principle of statutory construction that inclusio unius est exclusio alterius, no other delegation may be made.

In its final regulations on Arbitration of Pesticide Data Disputes, published at 45 Fed. Reg. 55394 et seq. (August 19, 1980) (codified at 29 C.F.R. Part 1440 and Appendix) the FMCS delegated the whole of these functions to the American Arbitration Association. The final regulations provide:

(1) "For this purpose, the Service will utilize as its roster of arbitrators the roster of commercial arbitrators maintained by The American Arbitration Association..." Id.

(2) "The FIFRA arbitration rules of the AAA will be the rules of procedure to be

followed for arbitration of pesticide data compensation disputes." Id.

The above cited final rule purports to be issued "under the authority of the Federal Insecticide, Fungicide, and Rodenticide Act," but no authority for such a delegation exists in said Act.

The delegation of its regulatory function by the FMCS to the AAA was in contravention of the applicable statutes and therefore illegal. Cudahy Packing Co. v. Holland, 315 U.S. 357, (1942). By its complete substitution of the AAA for itself, the FMCS has effectively rewritten the statute. It is elementary that administrative agencies may not re-write the statutes of Congress.

## 8. THE CHALLENGED PROVISIONS OF THE STATUTE ARE SEVERABLE FROM THE PROVISIONS FOR DATA USE AND DATA COMPENSATION

### (1) General Principles of Severability

The test of severability, as stated in Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234-235 (1932); Buckley v. Valeo, 424 U.S. 1, 108 (1976); and INS v. Chadha, ___ U.S. ___, 77 L.Ed.2d 317, 334 (June 23, 1983), is this:

> Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

This test is particularly appropriate because the severability clause in the challenged statute in Champlin, quoted in footnote 1 at 286 U.S. page 223, is very similar to FIFRA's severability clause, 7 U.S.C. 136x.

Applying this test to FIFRA Section 3(c)(1)(D)(ii), we find that the compulsory arbitration provisions are not severable from the provisions limiting judicial review, but both are severable from the rest of the statute.

(2) The Challenged
Provisions of the Statute are
Severable from the Rest of the Statue

Prior to the 1978 amendments, FIFRA Section 3(c)(1)(D) provided for subsequent applicants' use of data previously submitted by others and for an offer of compensation by the subsequent data user to the original data submitter, Pub. L. 92-516, 86 Stat. 973 (October 21, 1972), and reenacted in 1975, Pub. L. 94-140, 89 Stat. 751 (November 28, 1975). The offending provisions for compulsory arbitration and the offending provisions limiting judicial review may have been added in 1978 because the pesticide data compensation disputes were said to impose a burden on the EPA, Chevron Chemical Co. v. Costle, 641 F.2d. 104, 111 (3rd Cir.), cert. denied 452 U.S. 961 (1981). Thus, striking down compulsory nonreviewable arbitration would be

consistent with Congress' presumed intent to relieve the EPA of any such burden.

The non-offending provisions of the statute are grammatically distinct from the offending provisions. Striking the offending provisions of Section 3(c)(1)(D)(ii) (from and including "The terms and amount of compensation may be fixed . . ." to and including " . . . allow fifteen days from the date of delivery of the notice for the affected person to respond.") would leave the non-offending provisions operative. In the absence of the offending compulsory arbitration provisions and the offending provisions limiting judicial review, the Administrator could still use the data, the requirement of an offer to pay compensation would still exist, and the data submitter could bring suit in any court of competent jurisdiction.

(3) The Challenged Compulsory Arbitration Provisions are not Severable from the Challenged Prohibitions on Judicial Review

In the 1978 amendments to FIFRA, Congress enacted both the compulsory arbitration provisions and the provisions limiting judicial review. The compulsory arbitration provisions are not grammatically distinct from the provisions limiting judicial review, since one sentence contains provisions relating to both. Furthermore, there is absolutely nothing to indicate the type of judicial review Congress would have enacted in place of the offending provisions limiting judicial review. Moreover, there is no evidence in the legislative history to suggest that Congress intended to enact the compulsory arbitration provisions independently of the provisions limiting judicial review, Dorchy, 264 U.S. at 290, Champlin, 286 U.S. at 234-35, Buckley, 424 U.S. at 108, Chadha, 77 L.Ed.2d at 334.

The 1978 amendments were enacted by Pub. L. 95-396, 92 Stat. 819. (September 30, 1978) Although this law was derived most immediately from Senate Bill S. 1678, its legislative geneology includes two House bills, H.R. 7073 and H.R. 8681. The text of H.R. 7073, contained in House Report No. 95-334 (Agriculture), dated May 16 and June 1, 1977, does not contain any language related either to compulsory arbitration or to limitations on judicial review, see especially pp. 12-15. The text of S. 1678, particularly the part found at pages 129 and 130 of the Senate Report No. 95-334 (Agriculture, Nutrition and Forestry), dated July 6, 1977, contains language similar or identical to the language finally enacted, including both the compulsory arbitration provisions and the provisions limiting judicial review. Concerning H.R. 8681, page 3 of House Report No. 95-663 (Agriculture), dated October 5, 1977,

also contains language similar to the language finally enacted and also including both challenged provisions. Pages 3 and 4 of the conference report on S. 1678, Senate Conf. Rep. No. 95-1188, dated September 12, 1978, contains the final language, including both the challenged provisions. In short, there is no evidence of legislative intent to enact the compulsory arbitration provisions independently of the provisions limiting judicial review. Quite to the contrary, wherever one was proposed, so was the other.

Accordingly, although the unconstitutionality of FIFRA Section 3(c)(1)(D)(ii) can be cured by striking down the provisions for compulsory arbitration and those limiting judicial review, even assuming the compulsory arbitration provisions are constitutional alone, or would be made so if there were adequate provision for judicial review, the

statute cannot be cured by merely striking down the provisions limiting judicial review.

(4) The Partial Invalidity of the 1978 Amendments Revives the Prior Provisions for Dispute Resolution by the EPA

It appears that invalidity of the compulsory arbitration provisions and the provisions restricting judicial review, which were already shown to be separable from the rest of the 1978 Amendments, will revive the dispute resolution procedure of the prior law. It has been held that if a portion of an act which is an amendment of another act already in force is invalid and is inseparable from the remainder of the amendment, the entire amending act may be declared inoperative without in any way affecting the original act. (16 Am. Jr.2d, Constitutional Law, Section 263) This would be consistent with Congress' expressed intent under the 1975 Amendments to have pesticide compensation disputes resolved by an

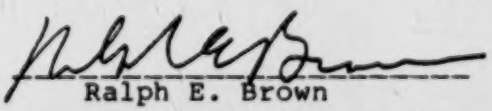
EPA Administrative law judge, which comports with Article III and the Fifth Amendment, and which would return compensation dispute resolution to the administrative law judges who had previously developed expertise in the area and are subject to review both by the Administrator and by the Article III courts.

## III.

## CONCLUSION

For the reasons set forth above, Sathon prays that the Court find the constitutionality of the provisions requiring compulsory arbitration and limiting judicial review to fraud, misrepresentation and other misconduct contained in FIFRA Section 3(c)(1)(D)(iii) is ripe for review, and that the Court hold these provisions to be unconstitutional.

Respectfully submitted,



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